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No. 84-1587

In the Supreme Court of the United States

OCTOBER TERM, 1984

BEAUFORD D. EDDLETON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the courts below erroneously denied him relief to which he was entitled because of an asserted breach of a plea agreement by the government.

1. a. Petitioner was charged in a criminal information with four counts of willful failure to file federal income tax returns. He consented to trial before a United States Magistrate. On May 12, 1982, pursuant to a plea agreement, petitioner pleaded guilty to count four of the information. The plea agreement provided that, at the time of sentencing, the government would move to dismiss counts one through three and would make the following recommendation as to a sentence: that petitioner be fined $10,000, that imposition of a sentence of imprisonment be entirely suspended, and that petitioner be placed on probation for a period to be determined by the court. Before accepting petitioner's plea, the magistrate advised him that "the Court does not listen to

recommendations by the United States Attorney in tax matters when it comes to penalties" (Pet. App. 6 n.2). See Pet App. 3-6.

Despite this advice that the prosecutor's recommendation would have no bearing on his sentence, petitioner did not indicate dissatisfaction with the plea agreement or make any effort to withdraw his plea during the eight weeks that elapsed between the entry of his plea and sentencing on July 14, 1982 (Pet. App. 7). At sentencing, the prosecutor stated that the government had agreed to recommend that imposition of sentence be suspended (*id.* at 6). Nevertheless the court sentenced petitioner to a one-year term of imprisonment, all but 90 days of which were suspended, to be followed by two years' probation; the court also imposed a $10,000 fine (*id.* at 7, 8). Petitioner did not appeal his conviction or sentence. He did, however, subsequently file motions to suspend and reduce his sentence, which were denied by the magistrate (*id.* at 7, 41).

b. On October 6, 1982, some eleven weeks after he was sentenced, petitioner filed a motion under 28 U.S.C. 2255 to vacate or set aside the sentence (Pet. App. 7, 41). In that motion, petitioner argued for the first time that his sentence was unlawful, contending that the magistrate was required to accept the government's sentencing recommendation (*id.* at 8). The magistrate rejected petitioner's contention (*ibid.*) but, sua sponte, considered the question whether the prosecutor had breached the plea agreement (*id.* at 9). The magistrate determined that the prosecutor had been obligated at sentencing "to attempt, in good faith, to influence the Court favorably to consider the recommendation," but had failed to live up to that standard (*id.* at 10). The magistrate gave petitioner 20 days within which to withdraw his plea, after which he would be entitled to plead anew (*id.* at 14).

Because he already had served his prison time, petitioner declined to withdraw his plea (Pet. App. 18, 41). Instead, in an effort to obtain a reduction or elimination of the remaining portion of the sentence—the $10,000 fine, which remained unpaid—petitioner filed a motion to be resentenced (*id.* at 18-19). That motion was granted, and petitioner was ordered to be resentenced before another magistrate (*id.* at 19, 41). At the resentencing hearing, the prosecutor made "an appropriate recommendation * * * in accordance with the original plea bargain" (*id.* at 20). Nevertheless, the magistrate, after fully advising petitioner that an enhanced sentence might be imposed, sentenced petitioner to one year's confinement, with all but four months suspended, and a $10,000 fine (*id.* at 41-42).

Petitioner appealed to the district court. The court observed that petitioner had made an informed election to be resentenced and that his choice simply turned out to be a bad one because the same $10,000 fine was imposed, but with an additional month of imprisonment (*id.* at 20-21). However, the court, believing that the government had breached the original plea agreement by failing "persuasively" to urge that the term of imprisonment be suspended, remanded the case to the magistrate for reimposition of the original sentence and consideration of whether petitioner was entitled to any additional relief (*id.* at 21-23, 42).

c. After the original sentence was reimposed on remand, petitioner requested reduction or suspension of the $10,000 fine (Pet. App. 24, 42). The magistrate denied petitioner that relief (*id.* at 24-25), and the district court affirmed (*id.* at 26-37), concluding that the magistrate had "conscientiously and carefully complied" with the district court's directive to consider reduction of sentence (*id.* at 34) and had not abused his discretion in failing to do so (*id.* at 34-35).

The court of appeals in turn affirmed (Pet. App. 38-46). The court observed that the government had not agreed to do anything more than recommend a suspended sentence and that the magistrate's failure to follow that recommendation did not entitle petitioner to relief (*id.* at 43). The court also concluded that petitioner already had been afforded all the relief it could grant, because he had been given the opportunity to withdraw his plea and then to be resentenced, and at the sentencing hearing the government "more than complied with its original bargain by strongly recommending probation" (*id.* at 44). Finally, the court concluded that the magistrate did not abuse his discretion in declining to grant petitioner's motion for reduction of sentence after his original sentence was reinstated (*id.* at 42-43).

2. The decision of the court of appeals rejecting petitioner's challenge to the magistrate's denial of relief in this collateral attack on his sentence is correct and does not conflict with the decision of any other court of appeals. Nor does petitioner's fact-bound challenge to the magistrate's exercise of his discretion otherwise warrant review by this Court.

a. As an initial matter, under this Court's recent decision in *United States* v. *Benchimol,* No. 84-1165 (May 13, 1985), it appears that the magistrate and district court erred in concluding that there was a breach of the plea agreement by the government. At sentencing, the prosecutor stated: "There's a recommendation agreed to by Mr. Carpenter in this matter, that a suspended imposition of sentence be imposed and a fine of $10,000.00" (Pet. App. 10). This statement sufficiently communicated to the court the sentencing recommendation the government had agreed to make. Compare *Benchimol,* slip op. 2. The district court's view that a violation could be found because the government was not more "persuasive[]" in recommending suspension of sentence (Pet. App. 21) is essentially identical

with the view rejected in *Benchimol* (slip op. 3) that the government may be found to have breached a plea agreement if it does not "enthusiastically" recommend the agreed-upon sentence. Moreover, even if there were a violation of Fed. R. Crim. P. 11(e) in this case, the time for petitioner to raise his objection was at sentencing or on direct appeal. The error is not one cognizable on collateral attack under 28 U.S.C. 2255. See *Benchimol,* slip op. 1 (Stevens, J., concurring in the judgment).

b. In any event, petitioner's fact-bound challenge to the particular remedy approved by the courts below for the asserted breach of the plea agreement does not warrant review. As petitioner concedes (Pet. 18-19), the determination of the relief to which a defendant is entitled in such a case is committed to the discretion of the sentencing court and depends on the specific circumstances of the case. See *Santobello* v. *United States,* 404 U.S. 257, 263 (1971); *Mabry* v. *Johnson,* No. 83-328 (June 11, 1984), slip op. 6 n.11; *United States* v. *Garcia,* 698 F.2d 31, 37 (1st Cir. 1983); *United States* v. *Bowler,* 585 F.2d 851, 856 (7th Cir. 1978). The court of appeals correctly determined that the magistrate did not abuse his discretion in denying petitioner's request for reduction of the $10,000 fine.

In *Santobello,* this Court referred to the two principal remedies for the breach of a plea agreement: (1) specific performance of the agreement at resentencing of the defendant by a different judge, and (2) allowing the defendant to withdraw his plea of guilty. 404 U.S. at 263. In the instant case, petitioner was given the opportunity to withdraw his guilty plea and plead anew, but he rejected that alternative. He then received specific performance of his plea agreement when he was resentenced by a different magistrate, following a hearing at which the government made a strong recommendation in accordance with the plea agreement. When that course resulted in imposition of a

greater sentence, as petitioner had been warned it might, the district court granted petitioner still further relief by remanding the case to the magistrate for reimposition of the original sentence and consideration of whether that sentence should be reduced. Thus, contrary to petitioner's repeated contention, it is simply not true that he received no relief for the government's breach of its agreement to make a particular recommendation. The magistrate and district court went to great lengths to accommodate petitioner, and the magistrate granted the very relief — resentencing — that he first requested. The fact that the magistrate did not adopt the government's recommendation on resentencing does not mean that the government's breach of its agreement to make that recommendation went unremedied.

Further, in the circumstances of this case, the relief now requested by petitioner—reduction or suspension of his fine—would not have been an appropriate remedy. Petitioner in fact agreed with the government as part of the original plea bargain that the government would recommend a $10,000 fine as part of the overall sentence, and the court imposed a fine in that amount. The magistrate, district court, and court of appeals cannot be faulted for failing to order a reduction of that agreed-upon fine because some other aspect of the government's recommendation provided for under the agreement—that petitioner serve no time in prison—was not accepted by the magistrate.

Moreover, contrary to petitioner's contention (Pet. 12-13), there is no reason to believe that the first magistrate's imposition of a term of imprisonment was the result of the breach by the government of the agreement to recommend probation (assuming that any such breach occurred). At the taking of petitioner's plea, the magistrate made it abundantly clear that he would not abide by any recommendation made by the government (Pet. App. 6 n.2); and the

second magistrate's imposition of an increased term of imprisonment on resentencing, despite the government's strong recommendation, indicates that incarceration was so clearly warranted in this case that a more forceful recommendation by the government at the first sentencing could not reasonably have been expected to have a significant impact.

Thus, there is no basis for concluding that petitioner was prejudiced at all by the asserted breach of the plea agreement by the government, much less that any such prejudice was insufficiently remedied by specific performance of the plea agreement at resentencing. It is true that petitioner by that time had already served the specified time in prison and that that aspect of the original sentence could not be undone by specific performance of the plea agreement at resentencing. But petitioner brought that circumstance on himself by failing to object to the government's performance at sentencing, to take a direct appeal, or even to bring this collateral attack promptly after sentencing. And even after petitioner did file this action under 28 U.S.C. 2255, he was responsible for delaying the magistrate's disposition of the matter (Pet. App. 6, 15-16 n.5).

The $10,000 fine petitioner now seeks to have reduced was a distinct element of the sentence authorized by Congress to accomplish goals of punishment and deterrence and petitioner could not directly object to that fine in these collateral proceedings because it was part of the recommended sentence under the plea bargain to which he agreed. Nor were the courts below required to reduce that fine as a sort of "damages" remedy for his having served time in prison by the time of resentencing. This is especially so since petitioner in his Section 2255 motion did not even raise the issue of a breach of the plea agreement by the government; that issue was raised sua sponte by the magistrate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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